

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

September 16, 1996

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket Nos. PENN 93-445
	:	PENN 94-54
NEW WARWICK MINING COMPANY	:	

BEFORE: Jordan, Chairman; Marks and Riley, Commissioners¹

DECISION

BY: Jordan, Chairman; and Riley, Commissioner

These civil penalty proceedings, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) (“Mine Act” or “Act”), raise the issues of whether Administrative Law Judge Arthur Amchan properly concluded that a violation of 30 C.F.R. § 75.400² by New Warwick Mining Company (“New Warwick”) resulted from its unwarrantable failure to comply with the standard, whether there was no violation of 30 C.F.R. § 75.360(b),³

¹ Commissioner Holen participated in the consideration of this matter, but her term expired before issuance of this decision. Pursuant to section 113(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 823(c), this panel of three Commissioners has been designated to exercise the powers of the Commission.

² Section 75.400 states:

Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on electric equipment therein.

³ Section 75.360(b) states, in part:

The person conducting the preshift examination shall examine for hazardous conditions

and whether five violations of 30 C.F.R. § 77.202⁴ were not significant and substantial (“S&S”). 16 FMSHRC 2451 (December 1994) (ALJ). The Commission granted cross-petitions for discretionary review challenging these determinations. For the reasons that follow, we affirm in part, vacate in part, and remand.⁵

I.

Factual and Procedural Background

A. Docket No. PENN 94-54

New Warwick operates the Warwick Mine, an underground coal mine, in Greene County, Pennsylvania. On July 26-28, 1993, Robert Santee, an inspector from the Department of Labor’s Mine Safety and Health Administration (“MSHA”), inspected the 3 left (012) longwall section of the mine. 16 FMSHRC at 2452. During this period, New Warwick was mining through a rock binder in the coal seam, which generated increased amounts of dust. *Id.* at 2453. In addition, as the longwall shields advanced, they dug into the mine bottom, “rolling” it onto the shield toes.⁶ Tr. 110-11. On July 26, Santee found float coal dust accumulations ranging up to 1/4-inch deep on and behind the longwall shields and issued a citation for violation of section 75.400. 16 FMSHRC at 2452; Gov’t Ex. 4. He informed the mine superintendent and longwall coordinator that the hose attached to the longwall shear was inadequate to prevent dust from accumulating and that washdown hoses needed to be installed across the pan line. 16 FMSHRC at 2452; Tr. 23, 79, 160.

On July 27, Santee discovered an accumulation of loose fine coal on a pump car at the end of the longwall supply track and issued another citation for violation of section 75.400. 16 FMSHRC at 2452; Gov’t Ex. 5. He also observed coal dust accumulations on and behind the longwall shields, but he did not issue a citation because cleanup was being performed. 16

⁴ Section 77.202 states:

Coal dust in the air of, or in, or on the surfaces of, structures, enclosures, or other facilities shall not be allowed to exist or accumulate in dangerous amounts.

⁵ Chairman Jordan and Commissioners Marks and Riley vote to affirm the judge’s determinations that the violation of section 75.400 resulted from unwarrantable failure and that there was no violation of section 75.360(b). Chairman Jordan and Commissioner Riley vote to vacate the judge’s determination that the violations of section 77.202 were not S&S and remand for further consideration. Commissioner Marks would reverse the judge’s S&S determination.

⁶ A shield toe is the horizontal, bottom part of the shield. Tr. 26.

FMSHRC 2452. Santee discussed with the mine safety director the need for continued efforts to prevent violations of section 75.400 at the longwall. *Id.*; Tr. 25, 28.

On July 28, Michael Smith, the longwall foreman on the night shift⁷ at Warwick Mine, conducted a preshift examination of the mine from 1:00 to 3:00 a.m. Tr. 21, 128. When Smith examined the 3 left (012) longwall section, he did not note any hazardous accumulations of loose coal or coal dust. Tr. 21, 132. The longwall broke down at approximately 3:30 a.m. Tr. 21. At 5:10 a.m., Inspector Santee, accompanied by Barry Radolec, an inspector trainee, inspected the longwall section. 16 FMSHRC at 2452; Tr. 90. Santee found float coal dust accumulations ranging up to 1/4-inch deep on the longwall shields. 16 FMSHRC at 2452; Gov't Ex. 1. He also found float coal dust accumulations on cables, loose coal accumulations ranging up to 6-inches deep behind the longwall shields, and loose coal mixed with slate rock up to 22-inches deep on some of the shield toes. *Id.*

Based on the foregoing, Inspector Santee issued New Warwick Order No. 3655504, pursuant to section 104(d)(2) of the Mine Act, 30 U.S.C. § 814(d)(2), alleging an unwarrantable and S&S violation of section 75.400 for failure to clean up the accumulations. 16 FMSHRC at 2452-53; Gov't Ex. 1. In addition, Santee issued New Warwick Order No. 3655505, pursuant to section 104(d)(2), alleging an unwarrantable and S&S violation of section 75.360(b) for failure to note the accumulations in the preshift examination record book. 16 FMSHRC at 2453; Gov't Ex. 2.

The Secretary of Labor subsequently proposed civil penalty assessments of \$4,100 and \$3,800 for the alleged violations of sections 75.400 and 75.360(b), respectively. New Warwick challenged the proposed assessments, contending that it had not violated the standards, the violations were not S&S, and the violations were not caused by its unwarrantable failure.

Following an evidentiary hearing, the judge concluded that New Warwick had violated section 75.400, that the violation was not S&S, but that it had resulted from New Warwick's unwarrantable failure to comply with the standard. 16 FMSHRC at 2452-56. The judge based the unwarrantable failure determination on his findings that, although the accumulations "had not existed for a long time," the accumulations were extensive, New Warwick should have been on "heightened alert" that such accumulations could occur, and New Warwick had not immediately commenced cleanup of the accumulations. *Id.* at 2455 & n.5. He assessed a civil penalty of \$2,000. *Id.* at 2455-56.

Further, the judge concluded that New Warwick had not violated section 75.360(b). *Id.* at 2456. He reasoned that the order was based on the assumption that the accumulations that served as the basis for the violation of section 75.400 were present during the preshift examination. *Id.* The judge credited the testimony of Smith, who conducted the preshift examination between 1:00

⁷ The night shift worked from 4:00 p.m. to 4:00 a.m. and the day shift worked from 4:00 a.m. to 4:00 p.m. 16 FMSHRC at 2456; Tr. 28.

and 3:00 a.m., that he had not observed any hazardous accumulations of coal or coal dust. *Id.* Recognizing that the longwall broke down at 3:30 a.m., the judge concluded that the accumulations observed by the inspector “may not have been present or may not have been as extensive” during the preshift examination. *Id.* Therefore, the judge determined that the preshift examination “may not have been inadequate” and he vacated the order. *Id.*

The Commission subsequently granted cross-petitions for discretionary review filed by New Warwick, challenging the judge’s determination that the violation of section 75.400 was unwarrantable, and by the Secretary, challenging the judge’s determination that there was no violation of section 75.360(b).

B. Docket No. PENN 93-445

On May 19, 1993, MSHA Inspector Frank Terrett inspected six overland conveyor belt transfer stations at Warwick Mine.⁸ 16 FMSHRC at 2459. Inside five of the transfer stations, Terrett found coal dust accumulations ranging from 1/8-inch to 4-inches deep on top of motors, inside electrical boxes, around belt rollers, and on the floors. *Id.*; Tr. 187, 189-90, 194-95, 208-09. Accordingly, he issued New Warwick five citations, pursuant to section 104(a) of the Mine Act, 30 U.S.C. § 814(a), alleging violations of section 77.202 for failure to clean up the accumulations. 16 FMSHRC at 2459; Gov’t Exs. 17-21. Subsequently, Inspector Terrett modified the citations to designate the violations as S&S. 16 FMSHRC at 2460; Tr. 202, 215-17; Gov’t Exs. 17-21.

The Secretary proposed civil penalty assessments totaling \$4,060 for the alleged violations. New Warwick challenged the proposed assessments, contending that it had not violated the standard and the violations were not S&S.

Following an evidentiary hearing, the judge concluded that New Warwick had violated section 77.202 but that the violations were not S&S. 16 FMSHRC at 2459-61. He noted that the Secretary’s theory that the violations were S&S was based largely on the need for an employee to jump from the second floor of the transfer station to escape a fire resulting from the accumulations. *Id.* at 2461. The judge found that each transfer station had three exits on the first floor and two or three exits on the second floor and that an employee would not have to jump from the second floor to escape a fire. *Id.* Therefore, he concluded that the Secretary had failed

⁸ The overland conveyor belt travels over fields from the supplier to the river. Tr. 204. The transfer stations house motor drives that operate contiguous sections of the conveyor belt. 16 FMSHRC at 2459; Tr. 187. Each transfer station is a 20-foot-square, 2-story metal building with a concrete first floor and a grate-type second floor. Tr. 204, 227, 229.

to establish a reasonable likelihood of serious injury. *Id.* The judge assessed civil penalties totaling \$1,800. *Id.* at 2462.

The Commission subsequently granted the petition for discretionary review filed by the Secretary, challenging the judge's determination that the violations of section 77.202 were not S&S.

II.

Disposition

A. Docket No. PENN 94-54

1. Unwarrantable Failure

New Warwick argues substantial evidence⁹ does not support the judge's finding that the section 75.400 accumulation violation was unwarrantable. It asserts that the accumulations had not existed for a long time and were not extensive, it was not on heightened alert for accumulations, cleanup surpassing the requirements of its cleanup plan had been performed by the night shift, and the area was going to be hosed down on the first pass by the day shift. N.W. Br. at 4-9. The Secretary responds that substantial evidence supports the judge's finding. He asserts that the accumulations were extensive and took at least one shift to amass, New Warwick was on notice that accumulations violated the standard, no cleanup had been performed by the night shift, and New Warwick's compliance with its cleanup plan does not shield it from an unwarrantable failure finding. S. Resp. Br. at 3-10.

The unwarrantable failure terminology is taken from section 104(d) of the Mine Act, 30 U.S.C. § 814(d), and refers to more serious conduct by an operator in connection with a violation. In *Emery Mining Corp.*, 9 FMSHRC 1997 (December 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary

⁹ The Commission is bound by the substantial evidence test when reviewing an administrative law judge's factual determinations. 30 U.S.C. § 823(d)(2)(A)(ii)(I). "Substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion." *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (November 1989), quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). While we do not lightly overturn a judge's factual findings and credibility resolutions, neither are we bound to affirm such determinations if only slight or dubious evidence is present to support them. See, e.g., *Krispy Kreme Doughnut Corp. v. NLRB*, 732 F.2d 1288, 1293 (6th Cir. 1984); *Midwest Stock Exchange, Inc. v. NLRB*, 635 F.2d 1255, 1263 (7th Cir. 1980). We are guided by the settled principle that, in reviewing the whole record, an appellate tribunal must also consider anything in the record that "fairly detracts" from the weight of the evidence that supports a challenged finding. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951).

negligence. *Id.* at 2001. Unwarrantable failure is characterized by such conduct as “reckless disregard,” “intentional misconduct,” “indifference” or a “serious lack of reasonable care.” *Id.* at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 193-94 (February 1991); *see also* *Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission’s unwarrantable failure test). The Commission “has recognized that a number of factors are relevant in determining whether a violation is the result of an operator’s unwarrantable failure, such as the extensiveness of the violation, the length of time that the violative condition has existed, the operator’s efforts to eliminate the violative condition, and whether an operator has been placed on notice that greater efforts are necessary for compliance.” *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (February 1994), *citing* *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (August 1992).

Preliminarily, the judge’s finding that the accumulations “had not existed for a long time” is supported by substantial evidence. The record indicates the accumulations resulted in part from a reduced amount of water applied on the last pass of the longwall shear on the night shift. 16 FMSHRC at 2455. Paul Wells, New Warwick’s longwall foreman on the day shift, testified that the night shift had “cut out,” i.e., turned around, at the no. 1 shield -- a process which produces a large amount of water mist and dust. *Id.* at 2454; Tr. 107-08, 118, 120. He explained that, during this process the crew usually reduces the amount of water to avoid getting wet from mist caught in the air traveling down the face. Tr. 118. Wells further stated that water sprays on the shear were suppressing dust from the headgate to the No. 40 shield during the last 10 or 15 minutes of the shift, but that a miner probably did not manually hose down the shields. Tr. 118-19, 121-22. In addition, the judge noted that, contrary to Inspector Santee’s and Radolec’s testimony that it appeared the longwall section had not been cleaned recently and the accumulations had collected over a full shift, Foreman Smith testified that cleanup had occurred during the night shift. 16 FMSHRC at 2453, 2455 n.5, *citing* Tr. 128-30 (longwall shields were hosed down “usually [on] every pass” and two crew members did nothing but shovel).

Although the accumulations had not existed for a long period of time, substantial evidence supports the judge’s determination that New Warwick’s violation was aggravated given the extensiveness of the accumulations, the fact that New Warwick had been placed on notice that greater efforts were necessary for compliance with the standard, and New Warwick’s failure to immediately clean up the accumulations.

First, substantial evidence supports the judge’s finding that the accumulations were extensive. 16 FMSHRC at 2455. Float coal dust had accumulated up to 1/4-inch deep on surfaces of the longwall shields, headgate, stageloader, cables, and cable trough, covering energized parts that supply power to the longwall shear. Tr. 18-19, 56, 92-94; Gov’t Ex. 1. In addition, loose coal had accumulated up to 6-inches deep behind the longwall shields and loose coal mixed with slate rock had accumulated up to 22-inches deep on some of the shield toes. Tr. 92-93; Gov’t Ex. 1. The accumulations were deposited along the entire longwall section, which was 123 shields in length. Tr. 98-99, 108; Gov’t Ex. 1.

Second, the judge's finding that New Warwick "should have been on a 'heightened alert' that such accumulations could occur" is also supported by substantial evidence. 16 FMSHRC at 2455, citing *Drummond Co.*, 13 FMSHRC 1362, 1368 (September 1991). The Commission has recognized that repeated similar violations may be relevant to an unwarrantable failure determination to the extent that they place an operator on notice that greater efforts are necessary for compliance with a standard. *Peabody*, 14 FMSHRC at 1263-64; *Drummond*, 13 FMSHRC at 1363-64, 1368. The record indicates that, during the previous inspection period (April 1 to June 30, 1993), MSHA had found 16 violations of section 75.400 at Warwick. Gov't Ex. 1. Moreover, twice during the two days preceding issuance of the instant order, Inspector Santee informed New Warwick that similar accumulations were not permitted. In fact, the mine superintendent assured Inspector Santee that preventive measures would be taken seriously because MSHA could use it as a basis for an unwarrantable failure finding. Tr. 24.

Finally, substantial evidence supports the judge's finding that New Warwick failed to take sufficient measures to clean up the accumulations. 16 FMSHRC at 2455 & n.5. In *Utah Power and Light Co.*, 11 FMSHRC 1926, 1933 (October 1989), the Commission held that the operator did not demonstrate unwarrantable failure because before and during the inspection, miners were shoveling the accumulations and attempting to abate the condition. Here, New Warwick was not engaged in cleanup when Inspector Santee observed the accumulations. Tr. 22, 108-09, 117, 128-30. Further, New Warwick had not yet implemented Inspector Santee's recommendation that additional washdown hoses be installed to facilitate cleanup of the accumulations. Tr. 79. Given New Warwick's knowledge that the reduction of water would lead to accumulations and that it had been warned during both of the past two days not to allow accumulations to exist, its reliance on the night shift's cleanup efforts or on the anticipated efforts of the day shift was not reasonable. See *Cyprus Plateau Mining Corp.*, 16 FMSHRC 1610, 1615 (August 1994) (to support a conclusion that an operator's conduct was not unwarrantable, an operator's good faith belief that its conduct was the safest method of compliance must be reasonable).

Based on consideration of the above factors, we conclude that substantial evidence supports the judge's determination that New Warwick demonstrated aggravated conduct by failing to clean up the accumulations. Accordingly, we affirm the judge's holding.

2. Violation of Section 75.360(b)

The Secretary argues that substantial evidence does not support the judge's finding that there was no violation of the section 75.360(b) preshift examination requirement. He asserts that the accumulations were extensive and took at least one shift to amass, the accumulations likely existed during the preshift examination, and the judge's finding that there was no preshift violation does not accord with his finding that the related accumulation violation was unwarrantable. S. Br. at 6-9. New Warwick responds that substantial evidence supports the judge's finding. N.W. Resp. Br. for Dckt. No. PENN 94-54 at 5-10.

In concluding that the accumulations may not have existed or been as extensive during the

preshift examination, the judge credited Foreman Smith's testimony that he had not observed any hazardous conditions over Inspector Santee's assumption that the accumulations had collected over a full shift. 16 FMSHRC at 2456. We find no basis to reverse the judge's credibility determination. The record indicates that the preshift examination of the mine was conducted between 1:00 and 3:00 a.m. (Tr. 21) but does not specify the time at which the longwall section was examined. Smith related that mining conditions were adverse and, as soon as the shields moved, they looked as though they had not been cleaned. Tr. 132. He asserted that the accumulations of float dust in the trough could have amassed in one pass of the longwall shear, which normally takes 30 to 45 minutes. Tr. 86-87, 111-12, 132-33. Thus, the longwall section could have been examined early during the preshift examination and one or more passes of the longwall could have occurred before the longwall broke down at 3:30 a.m. Therefore, the judge's conclusion that the accumulations may not have existed or been as extensive at the time the longwall section was examined is supported by substantial evidence. Accordingly, we affirm the judge's holding that New Warwick did not violate section 75.360(b).¹⁰

B. Docket No. PENN 93-445

1. Significant and Substantial

The Secretary argues substantial evidence does not support the judge's finding that the section 77.202 accumulation violations in the transfer stations were not S&S. He asserts the judge ignored testimony that an explosion, rather than a fire alone, was reasonably likely to occur and result in serious injury. S. Br. at 9-13. New Warwick responds that substantial evidence supports the judge's finding. It contends that the inspector improperly modified the citations, a fire and subsequent explosion were not likely, and an explosion has never occurred in a transfer station. N.W. Resp. Br. for Dckt. No. PENN 93-445 at 6-12.

The S&S terminology is taken from section 104(d) of the Mine Act, 30 U.S.C. § 814(d), and refers to more serious violations. A violation is S&S if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1 (January 1984), the Commission further explained:

In order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum*, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard -- that is, a

¹⁰ We reject the Secretary's argument that the judge's determination that there was no preshift violation is inconsistent with his finding that the violation of section 75.400 was aggravated. Although the accumulations were extensive, they could have amassed following examination of the longwall section.

measure of danger to safety -- contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

Id. at 3-4 (footnote omitted). See also *Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d at 135; *Austin Power, Inc. v. Secretary of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria). An evaluation of the reasonable likelihood of injury should be made assuming continued normal mining operations. *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (August 1985). When examining whether an explosion or ignition is reasonably likely to occur, it is appropriate to consider whether a “confluence of factors” exists to create such a likelihood. *Texasgulf, Inc.*, 10 FMSHRC 498, 501 (April 1988); see also *Eastern Assoc. Coal Corp.*, 13 FMSHRC 178, 184 (February 1991).

We agree with the Secretary that the judge erred by failing to address the hazard of explosion. The record indicates that Inspector Terrett was concerned about both the hazards of fire, which could result from deposited coal dust, and explosion, which could result from suspended coal dust. Tr. 192, 195, 201-02, 210-14, 219, 222. Terrett acknowledged that, if there were only a fire, an employee would not have difficulty getting out of the transfer station because he would have warning. Tr. 222-23. He also testified, however, that if the fire were instantaneous and created a dust explosion, an employee would have difficulty escaping and could be “killed right there.” Tr. 195, 223. In addition to his concern that an employee might have to jump off of the second floor to escape a fire or explosion, Terrett was concerned that an employee could be burned, inhale smoke or byproducts of the belts, or might not be able to get out of the building. Tr. 201, 202-03, 213.

New Warwick’s argument that there is no evidence an explosion has ever occurred in a transfer station is not dispositive of an S&S finding. *Buffalo Crushed Stone, Inc.*, 16 FMSHRC 2043, 2046 (October 1994); *Ozark-Mahoning Co.*, 8 FMSHRC 190, 192 (February 1986). Furthermore, the record does not suggest that Inspector Terrett acted inappropriately by modifying the citations. Terrett testified he modified the S&S designations after realizing the seriousness of the violations. Tr. 202-03, 215. He explained that, as a new inspector, he was inexperienced with “putting [citations] together” and writing modifications. Tr. 216. Terrett stated that he conferred with his supervisor to ensure that the modifications were correct. Tr. 216-17.

Because the judge failed to evaluate evidence or make findings and conclusions regarding the hazard of explosion, we vacate the judge’s determination that the violations were not S&S and remand the matter for further consideration.

III.

Conclusion

For the foregoing reasons, we affirm the judge's determinations that the violation of section 75.400 resulted from unwarrantable failure and that there was no violation of section 75.360(b). In addition, we vacate the judge's determination that the violations of section 77.202 were not S&S and remand for further consideration.

Mary Lu Jordan, Chairman

James C. Riley, Commissioner

Commissioner Marks, concurring in part and dissenting in part:

I concur in this decision, with the exception of the disposition regarding the violations of 30 C.F.R. § 77.202. In view of the record evidence, I conclude that the violations were S&S and therefore I would reverse the judge's contrary conclusion.

Marc Lincoln Marks, Commissioner